Supreme Court, U.S.
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No. 02-1254

In The
Supreme Court Of The United States

ADVANCED COMMUNICATION DESIGN, INC.,

Petitioner,

v.

PREMIER RETAIL NETWORKS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

RESPONDENT PREMIER RETAIL NETWORKS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

The Federal Circuit held that the district court clearly erred in finding willful and intentional wrongdoing in this case and made specific findings that the delay in filing Premier's Answer to Advanced's Complaint in this action was the result of "unintentional wrongdoing only" – not willful or intentional delay. The Federal Circuit found, moreover, that Premier acted in good faith in connection with the litigation, that setting aside the default would not cause prejudice to Advanced, and that Premier asserted a meritorious defense to Advanced's claim for patent infringement.

(1) Was it error for the Federal Circuit to consider the equitable factors weighing strongly in favor of trial on the merits?

(2) Where the Federal Circuit examined the conduct of both Premier and its outside law firm and found no evidence of bad faith but only a single, simple mistake, was it error for the court to find that Premier had not willfully flaunted court rules?

RESPONDENT'S RULE 29.6 DISCLOSURE

Respondent Premier Retail Networks Inc. is a wholly-owned subsidiary of PRN Corporation.

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RESPONDENT PREMIER RETAIL NETWORKS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

This Court's decision in *Pioneer Investment Servs. Co. v. Brunswick*, 507 U.S. 380 (1993), established the rule that a court should consider all of the surrounding circumstances in determining whether to set aside a default. Since *Pioneer*, no circuit in the country has held that delay that results from unintentional wrongdoing only (rather than willful delay or contumacious conduct) forecloses consideration of the "other factors" considered by the Federal Circuit here under Eighth Circuit law.

Following *Pioneer* and its progeny case law in the Eighth Circuit, the Federal Circuit expressly found that the district court clearly erred in finding intentional and willful conduct on the part of Premier (and/or its counsel) in failing to timely file Premier's Answer to the Complaint. After a careful review of the facts and a correct statement of the law, the Federal Circuit correctly concluded that the delay was the result of "unintentional wrongdoing only," which – given the other factors for consideration under binding precedent from this Court and the Eighth Circuit – made the district court's refusal to set aside the default an abuse of discretion. Because there is no conflict between the circuits as to the law that applies to these facts, the Petition should be denied.

STATEMENT OF THE CASE

The district court based its decision to enter default judgment against respondent Premier in this case on the determination that Premier had engaged in intentional, willful, "culpable" and "contumacious" conduct because "both Premier and Premier's attorney clearly knew about the complaint but failed to file a timely answer." *See* Petitioner's Appendix at A-

49, A-52-53 (hereinafter "A-____"). On appeal, the Federal Circuit reversed. In so doing, the Federal Circuit expressly found that the district court clearly erred in finding intentional and willful conduct on the part of Premier or its counsel in failing to timely file Premier's Answer to the Complaint. *See* A-3, A-13-16. The Federal Circuit determined, instead, that the delay was the result of "unintentional wrongdoing only" and, further, was only a marginal failure to meet pleading deadlines, of the type commonly excused by the Eighth Circuit. *Id.* Relying on binding precedent from this Court and the Eighth Circuit, the Federal Circuit held that the district court abused its discretion in refusing to set aside the default. *See* A-13 ("Accordingly, the district court abused its discretion by finding that Premier's behavior constituted inexcusable contumacious conduct").

Contrary to the contentions in Advanced's Petition to this Court, the Federal Circuit's decision to set aside the default was not based on a determination that "the District Court's specific finding of willful default was outweighed by several equitable considerations." Petition at 7. Nor was it based on "various post-default facts." *Id.* at i. Rather, the Federal Circuit found from all of the evidence that the district court's finding of willfulness itself was clearly erroneous. A-15 ("the district court clearly erred ..."). As the Federal Circuit stated in its opinion, an analysis of the relevant prejudice and meritorious defense simply shored up its conclusion that there was good cause to set aside the default. *See* A-16.

Advanced petitioned for rehearing and rehearing *en banc* contending there, as it does here, that the Federal Circuit had failed to independently review the actions of Premier's counsel in responding to the Complaint and, moreover, that the court had made a critical factual error in finding that "Premier advised attorney Paul Davis the dispute between the parties would be

handled 'CEO to CEO' *after* being served with the summons and complaint" (emphasis by Advanced). *See* Petition at 13. The petition for rehearing and rehearing *en banc* was denied.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict among Circuits as to What Factors the Court Should Consider in the Absence of a Finding of Willful and Intentional Delay or Abuse of Process.

Advanced concedes that this Court's decision in *Pioneer Investment Servs. Co. v. Brunswick*, 507 U.S. 380, 396-97 (1993), established the "well-recognized test" for obtaining relief from a default judgment under Fed.R.Civ.P. 60(b), directing courts to consider multiple equitable factors including without limitation, the danger of prejudice to the non-defaulting party, the length of the delay and its potential impact on the judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith. *See Pioneer*, 507 U.S. at 395. The same considerations apply when a party moves to set aside an entry of default under Rule 55(c), but under the more lenient standard of whether there is good cause to set aside the default. *See Johnson v. Dayton Elec. Mfg. Co.*, 140 F.3d 781, 783-84 (8th Cir. 1998).

Notwithstanding the "other equitable factors," a court may refuse to set aside the default if there is "any indication at all of bad faith." *Pioneer*, 507 U.S. at 398. Accordingly, as to the first factor for consideration, the Eighth Circuit has consistently distinguished between "marginal failures" to comply with the time requirements for answering a complaint, on the one hand, and dismissals or other sanctions imposed for willful violations of court rules, contumacious conduct or intentional delays, on

the other. *See U.S. ex rel. Time Equip. Rental and Sales, Inc. v. Harre*, 983 F.2d 128, 130 (8th Cir. 1993); *see also Johnson*, 140 F.3d at 784 (explaining that even "'willful' is too ambiguous a term to define this inquiry" and distinguishing "between contumacious or intentional delay or disregard for deadlines and procedural rules, and a 'marginal failure' to meet pleading or other deadlines").[1] Applying Eighth Circuit law, the Federal Circuit drew the same distinction here.

The Federal Circuit found no evidence that Premier intentionally or repeatedly delayed answering Advanced's Complaint, attempted to "hide" the litigation from its investors or intended to prejudice Advanced. In short, despite Advanced's strained efforts to concoct some secret "strategy" on the part of Premier, the court found only a single, simple oversight resulting from "unintentional conduct only." A-3; *see also* A-13-14; A-16. With these findings, the court correctly considered the equitable factors before it: that Premier asserted a meritorious defense to infringement and that setting aside the default would not cause prejudice to Advanced. *See Pioneer*, 507 U.S. at 395. The court properly held that the district court abused its discretion in refusing to set aside the entry of default. *See* A-15-16; *see also Johnson*, 140 F.3d at 784-85.

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[1] The Eighth Circuit has explained that, where the defendant's negligence involves nothing more than a "single, simple error," the "other equitable considerations" -- *i.e.*, the existence of a meritorious defense and the lack of prejudice to the plaintiff -- "are entitled to significant weight in determining whether the motion [for relief from default] should be granted." *Union Pac. R. Co. v. Progress Rail Servs. Corp.*, 256 F.3d 781, 783 (8th Cir. 2001) (also referring to brief delays in answering the complaint as a "minor mistake").

This case does not present any conflict among the circuits on this issue. Advanced has not cited, and cannot cite, a single precedential case where any circuit in the country (since *Pioneer*) has held that a brief lapse in answering a complaint – with no evidence of bad faith or willfulness – is, in itself, enough to warrant a court's refusal to set aside an entry of default or even a default judgment.[2] To the contrary, it is clear that *Pioneer* requires the circuit court to consider all of the equitable factors where, as here, the circuit court finds no bad faith or willful misconduct. Because there is no conflict among the circuits on this issue, and because what Advanced requests is an advisory opinion on a question that is not before this Court, Advanced's Petition for Writ of Certiorari should be denied. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998) (noting that this Court has disapproved of advisory opinions "from the beginning").

II. The Federal Circuit Correctly Found That the Brief Delay in Answering Advanced's Complaint Did not Demonstrate a Willful Disregard for Court Rules, Nor was it Otherwise "Contumacious Conduct."

Advanced next contends that the Federal Circuit erred in finding no willful conduct without – as Advanced describes it – "independently evaluat[ing]" the "actions of the defaulting party's counsel." Petition at 12. What Advanced's argument

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[2] *KPS & Assocs., Inc. v. Designs by FMC, Inc.*, 318 F.3d 1 (1st Cir. 2003), cited by Advanced in its petition, is inapposite. There, the circuit court affirmed the district court's finding of willfulness.

Hunt v. Ford Motor Co., 65 F.3d 178 (Table), 1995 WL 523646 (10th Cir. 1995), also cited by Advanced, is an unpublished opinion and, by its own terms, should not be cited as precedent.

comes down to is a factual dispute that does not warrant review by this Court. *See* Sup. Ct. Rule 10.

As a preliminary matter, Advanced overstates the findings required by *Pioneer* regarding counsel's conduct. *Pioneer* does not require, as Advanced implies, that the Court make specific findings as to counsel's efforts to comply with an applicable deadline. To the contrary, as to counsel *Pioneer* simply held that "clients must be held accountable for the acts and omissions of their attorneys." 507 U.S. at 396. Here, the Federal Circuit held Premier accountable for the acts and omissions of its counsel. Even so, it found that those acts and omissions demonstrated negligence only. It found no evidence of willful misconduct.

As to its dispute of the facts, Advanced contends that knowing the conduct of attorney Stephen Clulow is critically important. Curiously, however, Advanced never deposed Mr. Clulow and simply glossed over any mention of him by other deponents at the district court level, focusing instead on whether Premier had disclosed the suit to its investors. Now is not the time for Advanced to inject new inquiries about the facts into the case. Premier carried its burden by explaining the reasons for the oversight and providing other good cause for setting aside the default. The Federal Circuit accepted Premier's explanation. Advanced has failed to provide a shred of any contrary evidence. *See* A-14 ("[T]he record does not show that Premier was simply flouting the rules or otherwise playing games with either Advanced or ... the district court").

Advanced also raises what it describes as a "mistaken factual conclusion that Appellant advised its counsel the dispute between the parties would be handled 'CEO to CEO' *after* being served with the Summons and Complaint." Petition at 13, *citing* A-6 (emphasis in the Petition). The Federal Circuit considered

and rejected this factual dispute in considering the Combined Petition for Rehearing and Rehearing *En Banc*. Regardless of the timing of the "CEO-to-CEO" instruction, there is no evidence in the record – and Advanced can cite to none – that this instruction was ever retracted or that Mr. Davis did not continue under the impression that this instruction was still in place even after the Complaint was served.

In short, Advanced mischaracterizes the facts and wrongly implies that the Federal Circuit did not consider the conduct of Premier's counsel in failing to timely answer the Complaint. The Federal Circuit's opinion includes a number of findings of fact specifically directed to the conduct of Premier's counsel; namely,

- that the 37-day delay "resulted from otherwise excusable conduct, including a misunderstanding and perhaps even a 'cavalier approach' by [Premier's] attorneys;"

- that Advanced's own documents (a memorandum of Advanced's counsel) reflect "Premier's counsel's 'surprise' that Premier had not yet responded to the service of Advanced's complaint;"

- that "Premier and its attorneys only failed to meet the filing deadline by 37 days (not three years);" and

- that "Premier took action as soon as it learned of the default, initiating communication via its attorneys with Advanced only a week thereafter and

> filing an answer only two days after that counsel-to-counsel communication."

A-13-15. The court made these findings after extensive inquiry, during oral argument, into the conduct of Premier's attorneys.

On the whole of the record, the Federal Circuit correctly concluded that the conduct of Premier and its attorneys "does not show an intentional disregard or other contumacious conduct, the type of behavior needed to justify the entry of a default judgment without any consideration of the other 'good cause' factors." A-11-15 (explaining that "the precedents ... excuse negligent and even 'cavalier behavior' – *by either the defaulting party or that party's attorneys* – as to court rules and procedures") (emphasis added). It held that, in finding such culpable conduct, the district court "erroneously transformed the relatively short delay and Premier's awareness of the pending complaint into a reason in and of itself for finding intentional wrongdoing." A-13. "Accordingly," held the court, "the district court abused its discretion by finding that Premier's behavior constituted inexcusable contumacious conduct." A-13.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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